IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

COLETTE JENKINS,

      Plaintiff,

    v.

MGAGE, LLC and LL ATLANTA,
LLC d/b/a OPERA NIGHTCLUB,

      Defendants.

            1:14-cv-2791-WSD

OPINION AND ORDER

This matter is before the Court on Plaintiff Colette Jenkins's ("Plaintiff")

Motion for Summary Judgment [34] ("Plaintiff's Motion") and Defendants

mGage, LLC ("mGage") and LL Atlanta, LLC d/b/a Opera Nightclub's ("Opera")

(together, "Defendants") Motion for Summary Judgment or, in the Alternative,

Partial Summary Judgment on Intentionality [37] ("Defendants' Motion"). Also

before the Court are mGage's Motion for Partial Summary Judgment [36]

("mGage's Motion"), Plaintiff's Motion to Strike mGage's Motion [47], and

Plaintiff's "Motion for Leave to File Plaintiff's Statement of Facts (Out-of-Time)"

[54] ("Motion for Leave").

I.   BACKGROUND

A.   Summary

This is an action for alleged violations of the Telephone Consumer Protection Act, 47 U.S.C. § 227, et seq. ("TCPA"), which prohibits using an automatic telephone dialing system ("ATDS") to send a text message to a cellular telephone for other than emergency purposes or without the recipient's prior express consent. See 47 U.S.C. § 227(b)(1)(A)(iii). Plaintiff maintains that, from August 2013 through July 2014, Defendants used an ATDS to send Plaintiff approximately 150 text messages promoting events at a nightclub operated by Opera. Plaintiff argues that she did not consent to receiving the text messages and that she continued to receive them even after she told Defendants seventeen (17) times to stop sending her text messages. Defendants contend they did not employ an ATDS, including because the text messages were sent only as the result of human intervention.

B.   mGage's Platform

Defendant mGage is a mobile marketing company that provides content routing services for corporate customers. (Defs.' Statement of Material Facts [42]

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("DSOMF") ¶¶ 3, 7-8, 14).[1] mGage provides a platform (the "Platform") with which a customer, such as Opera, may interact to send text messages to recipients. (Id. ¶ 7). Opera is a night club that had a contract with mGage. Under the contract, Opera had a license to utilize mGage's Platform to transmit promotional text messages to its customers. (Id. ¶¶ 12-13, 17-18). Opera used mGage's Platform to send the promotional text messages as issue in this case. (See id. ¶ 22).

To send promotional text messages, an mGage customer, such as Opera, must navigate to a website and log into mGage's Platform. (See id. ¶¶ 63-65).[2] Once logged in, an Opera employee must type the content of the text message into the Platform. (Id. ¶ 70). Opera employees determined the content of each text message, (id. ¶ 67), and typed the contents of the text message into the Platform, (id. ¶ 70). After entering the text message content into the Platform, the Platform allowed Opera employees to choose when to send out the text message. (Id. ¶ 71). If the employee wanted to send the text messages immediately, the employee clicked the "send" button. (Id. ¶ 73). The employee could also use the drop-down

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[1]   Unless otherwise noted, Plaintiff admits the facts in Defendant's Statement of Material Facts recited below. (See Pl.'s Resp. to DSOMF [43] ("PRDSOMF")).
[2]   Plaintiff denies that an Opera employee, Rosanna Penaflorida, created and sent out promotional text messages to Opera's customers using mGage's Platform. Plaintiff fails to cite any evidence in the record to support her denial.

calendar function on the Platform to schedule a later date and time at which a text

message would be sent. (Id. ¶¶ 71-74).

Opera determined the telephone numbers to which text messages were sent.

(Id. ¶ 76).[3] It did so by choosing a particular list of numbers that was housed on

mGage's Platform. (Id. ¶ 77). Opera employees uploaded the list of numbers to

the Platform as a Common Separated Values ("CSV") file. (Id. ¶ 78). The

numbers in the CSV file were obtained by promotional campaigns that asked

individuals to text a certain keyword or phrase to 67372, Opera's short code.

When an individual texted the keyword or phrase to the short code, their number

was added to the list that corresponded to the promotional campaign. (Id. ¶ 81).

Each keyword or phrase was placed on a different list, so the customer could sign

up and get information about different events, for example a college night event or

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[3]   Plaintiff denies this assertion, stating "Opera did not know to whom or to
what telephone numbers its messages were being sent, as all of those numbers
were stored on the text messaging system in a CSV file." (PRDSOFM ¶ 76). The
deposition testimony Plaintiff relies on in support of her position is not persuasive.
Ms. Penaflorida testified that there were between 10,000 and 50,000 numbers on
the list of telephone numbers to which Opera sent texts, and that it was "[p]retty
easy" to remove a telephone number from the list. (Dep. of Rosanna Penaflorida
[34.4] ("Penaflorida Dep.") at 18, 20). This testimony does not support that Opera
did not know to whom or to what telephone numbers its messages were sent.
Moreover, the testimony of Harvey Scholl, mGage's Rule 30(b)(6) witness,
supports that Platform users like Opera compile and control the telephone numbers
in the CSV file. (Dep. of Harvey Scholl [38.5] ("Scholl Dep.") at 19-21).

an electronic music night. (Id. ¶¶ 82, 83). Opera also manually uploaded telephone numbers to the Platform when individuals added their number to a list on Opera's website, or on a guest list form. (Id. ¶ 85).

C.   Text Messages to Plaintiff

On September 26, 2012, an individual used a mobile device assigned a number ending in 2763 to text the word "college" to Opera's short code. (Id. ¶ 118). Around April 2013, the telephone number was reassigned to Plaintiff. (Id. ¶ 119). Around August 2013, Plaintiff began receiving text messages advertising Opera's upcoming events. (Id. ¶ 121). She continued receiving text messages from Opera's short code through July 2014. (Id. ¶ 122). Plaintiff sent multiple text messages asking to be removed from Opera's promotional text message list. (Id. ¶ 123). On July 14, 2014, Plaintiff responded "STOP TEXT" to Opera's short code. (Id. ¶ 124). The final message Plaintiff received from Opera's short code stated, "You have been opted out of Opera Nightclub Alerts and will no longer receive messages from us. Reply HELP for help. Msg&Data rates may apply." (Id. ¶ 125).

D.   Procedural History

On August 28, 2014, Plaintiff filed this action, alleging violations of the TCPA. Plaintiff seeks statutory damages, actual damages, treble damages, costs,

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and interest. (Am. Compl. [15] at 10). On August 31, 2015, Plaintiff filed her

Motion. In it, she seeks summary judgment, arguing that "[t]here is no dispute that

Defendant sent numerous, non-emergency text messages using an automated

telephone dialing system to the cellular telephone of Plaintiff . . . ." ([34] at 14).

Plaintiff incorporated a statement of material facts into the "Factual Background"

section of her brief in support of her Motion. She did not include with her Motion

the separate statement of material facts required by the Court's Local Rules. See

L.R. 56.1(B), NDGa. In response to Plaintiff's Motion, Defendant argues

Plaintiff's Motion should be denied, including because of Plaintiff's failure to file

the separate statement of undisputed facts that the Court's Local Rules require.

On August 31, 2015, Defendant mGage filed its Motion. mGage seeks

partial summary judgment, arguing it cannot be held liable for any violations of the

TCPA that occurred prior to January 4, 2014—the date upon which mGage

purchased Velti, the company that owned the Platform Opera used to send text

messages. In response, Plaintiff seeks to strike mGage's Motion, arguing that it

relies on documents that were not produced to Plaintiff.

On September 1, 2015, Defendants moved for summary judgment. In the

Motion, they argue, among other things, that Plaintiff fails to show that Defendants

employed an ATDS, including because the text messages were sent only as the

result of human intervention. Defendants also seek partial summary judgment on

Plaintiff's claim for treble damages, arguing that Plaintiff fails to show Defendants

intentionally ignored Plaintiff's requests to stop sending text messages.

On October 21, 2015, Plaintiff filed her Motion for Leave to file her separate

statement of material facts out-of-time. Defendants oppose the motion.

II.   ANALYSIS

A.   Legal Standard

Summary judgment is appropriate where the pleadings, the discovery and

disclosure materials on file, and any affidavits show that there is no genuine issue

as to any material fact and that the moving party is entitled to judgment as a matter

of law. See Fed. R. Civ. P. 56. The party seeking summary judgment bears the

burden of demonstrating the absence of a genuine dispute as to any material fact.

Herzog v. Castle Rock Entm't, 193 F.3d 1241, 1246 (11th Cir. 1999). Once the

moving party has met this burden, the nonmoving party must demonstrate that

summary judgment is inappropriate by designating specific facts showing a

genuine issue for trial. Graham v. State Farm Mut. Ins. Co., 193 F.3d 1274, 1282

(11th Cir. 1999). The nonmoving party "need not present evidence in a form

necessary for admission at trial; however, he may not merely rest on his

pleadings." Id.

"At the summary judgment stage, facts must be viewed in the light most favorable to the nonmoving party only if there is a 'genuine' dispute as to those facts." Scott v. Harris, 550 U.S. 372, 380 (2007). Where the record tells two different stories, one blatantly contradicted by the evidence, the Court is not required to adopt that version of the facts when ruling on summary judgment. Id. "[C]redibility determinations, the weighing of evidence, and the drawing of inferences from the facts are the function of the jury . . . ." Graham, 193 F.3d at 1282. "If the record presents factual issues, the court must not decide them; it must deny the motion and proceed to trial." Herzog, 193 F.3d at 1246. The party opposing summary judgment "'must do more than simply show that there is some metaphysical doubt as to the material facts . . . . Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no genuine issue for trial.'" Scott, 550 U.S. at 380 (quoting Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 586-87 (1986)). A party is entitled to summary judgment if "the facts and inferences point overwhelmingly in favor of the moving party, such that reasonable people could not arrive at a contrary verdict." Miller v. Kenworth of Dothan, Inc., 277 F.3d 1269, 1275 (11th Cir. 2002) (quotations omitted).

B.   Discussion

The crux of the parties' dispute is whether the Platform is an ATDS under

the TCPA. Defendants claim a key feature of an ATDS is the capacity to dial

numbers or send text messages without human intervention. Defendants argue

that, because the Platform requires several steps to be performed by a human, it is

not an ATDS. Plaintiff contends that orders promulgated by the Federal

Communications Commission ("FCC") support that the Platform is an ATDS.

The TCPA provides that it is "unlawful for any person within the United

States, or any person outside the United States if the recipient is within the United

States—(A) to make any call (other than a call made for emergency purposes or

made with the prior express consent of the called party) using any automatic

telephone dialing system . . . (iii) to any telephone number assigned to

a . . . cellular telephone service . . . or any service for which the called party is

charged for the call." 47 U.S.C. § 227(b)(1). "The term 'automatic telephone

dialing system' means equipment which has the capacity—(A) to store or produce

telephone numbers to be called, using a random or sequential number generator;

and (B) to dial such numbers." Id. § 227(a)(1).

The Hobbs Act, 28 U.S.C. § 2342(1), "provides the federal courts of appeals

with 'exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to

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determine the validity' of FCC orders." Murphy v. DCI Biologicals Orlando,

LLC, 797 F.3d 1302, 1306-1307 (11th Cir. 2015) (quoting 28 U.S.C. § 2342(1)).

"District courts may not determine the validity of FCC orders, including by

refusing to enforce an FCC interpretation . . . ." Id. Accordingly, "a district court

must afford FCC final orders deference and may only consider whether the alleged

action violates FCC rules or regulations." Id. [4]

When the TCPA was passed, telemarketers used dialing equipment to create

and dial arbitrary 10-digit phone numbers. Smith v. Markone Fin., LLC, No. 3:13-

CV-933-J-32MCR, 2015 WL 419005, at *2 (M.D. Fla. Feb. 2, 2015) (citing 18

FCC Rcd. 14014 ¶ 132 (July 3, 2003) ("2003 FCC Order")). Around the turn of

the century, however, it became more cost effective for the teleservices industry to

use lists of numbers. Id. The important factor, the capacity to dial numbers

without human intervention, remained the same. Id. In 2003, in the face of these

technological advances, the FCC considered the application of the TCPA's

definition of an ATDS to what are called "predictive dialers." A predictive dialer

is "hardware, when paired with certain software, [which] has the capacity to store

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[4]   The Court notes the TCPA's prohibition on automated dialing applies to
voice calls and text messages. See 27 FCC Rcd. 15391 ¶ 2 (Nov. 26, 2012); see
also Legg v. Voice Media Grp., Inc., 20 F. Supp. 1370, 1373 (S.D. Fla. 2014)
(citing Gager v. Dell Fin. Servs., LLC, 727 F.3d 265, 269 n.2 (3d Cir. 2013)).

or produce numbers and dial those numbers at random, in sequential order, or from a database of numbers." 18 FCC Rcd. 14014 ¶ 131 (July 3, 2003). The FCC noted that "[t]he basic function of such equipment . . . [is] the capacity to dial numbers without human intervention." Id. ¶ 132 (emphasis omitted). It concluded that "predictive dialers . . . fall[] within the meaning and statutory definition of 'automatic telephone dialing equipment' and the intent of Congress." Id. ¶ 133.

In 2008, the FCC affirmed "that a predictive dialer constitutes an automatic telephone dialing system and is subject to the TCPA's restrictions on the use of autodialers." 23 FCC Rcd. 559 ¶ 12 (Jan. 4, 2008) ("2008 FCC Order"). In 2012, the FCC emphasized that the definition of autodialer "covers any equipment that has the specified *capacity* to generate numbers and dial them without human intervention regardless of whether the numbers are randomly or sequentially generated or come from calling lists." 27 FCC Rcd. 15391 ¶ 2 n.5 (Nov. 29, 2012) (emphasis in original).

On June 18, 2015, the FCC issued a declaratory ruling and order reiterating "that the basic functions of an autodialer are to dial numbers without human intervention . . ." 30 FCC Rcd. 7961 ¶ 17 (July 10, 2015) ("2015 FCC Order"). The FCC clarified: "How the human intervention element applies to a particular piece of equipment is specific to each individual piece of equipment, based on how

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the equipment functions and depends on human intervention, and is therefore a

case-by-case determination." Id. The 2015 FCC Order also provides that, "even

when dialing a fixed set of numbers, equipment may nevertheless meet the

autodialer definition." Id. ¶ 12. The 2015 FCC Order includes "Internet-to-phone

text messaging technology" in the definition of "automatic telephone dialing

system," reasoning that, "[s]o long as the initiating device has the requisite

capacity to meet the statutory definition of an autodialer and send a text

message . . . the fact that the message is initiated from a phone versus some other

device is not relevant." Id. ¶¶ 111 & n.379.

"[T]hrough these implementing regulations, the FCC has indicated that the

definition of ATDS now includes 'predictive dialers,' which may dial numbers

from preprogrammed lists rather than generate numbers randomly or sequentially."

Luna v. Shac, LLC, 122 F. Supp. 3d 936, 939 (N.D. Cal. 2015). "Accordingly, the

fact that [Defendants' Platform] has the ability to send text messages from

preprogrammed lists, rather than randomly or sequentially, does not disqualify it as

an ATDS." Id.

Defendants argue they are entitled to summary judgment because the text

messages were sent as the result of human intervention, and thus were not sent by

an autodialer. In support of their argument, they rely primarily on the Northern

District of California's decision in <u>Luna</u>. In <u>Luna</u>, the court granted summary

judgment to a defendant that sent text messages using a web-based system very

similar to the Platform at issue here. In reaching its conclusion, the <u>Luna</u> court,

after thoroughly reviewing the FCC's 2003, 2008, and 2015 Orders, noted the FCC

has "indicated that the defining characteristic of an autodialer is the capacity to dial

numbers without human intervention." <u>Id.</u> at 940 (internal quotation marks

omitted). Turning to the system operated by the defendant, the <u>Luna</u> court

observed that "human intervention was involved in several stages of the process

prior to Plaintiff's receipt of the text message, including transferring the number

into the CallFire database, drafting the message, determining the timing of the

message, and clicking 'send' on the website to transmit the message to Plaintiff."

<u>Id.</u> The court concluded the text messages at issue were sent as a result of human

intervention, and granted summary judgment in favor of defendant. <u>Id.</u> at 941-42.

Here, the same types of human intervention were required to send the text

messages to Plaintiff. It is undisputed that, to send promotional messages, an

Opera employee had to: (i) navigate to a website; (ii) log into the Platform;

(iii) determine the content of the text message; (iv) type the content of the text

message into the Platform; (iv) determine whether to send the text message

immediately or to schedule a later date to send the message; (v) either click "send"

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to send the message immediately, or take action to select a later date and time to

send the message by using a drop-down calendar function. (See DSOMF ¶¶ 63-65,

67, 70, 71-74). Opera also determined the telephone numbers to which text

messages were sent by an employee choosing a particular list of numbers and

uploading the list to mGage's Platform as a CSV file. (Id. ¶¶ 76-78).

Plaintiff attempts to distinguish Luna.[5] Plaintiff first argues the texting

system in Luna "required an employee to manually type a phone number into the

website, or manually uploading [sic] (by cutting or pasting those numbers into the

website), manually designating which phone numbers to which text messages

would be sent," whereas here Opera loaded a list of numbers onto the Platform

and, in addition, customers could sign up to join the list. ([44] at 6). The Luna

court, however, noted that an "existing list of phone numbers" could be

"upload[ed]" into the website, and that, additionally, "customers could add

themselves to the platform by sending their own text messages to the system." 122

F. Supp. 3d at 937. This description appears to be nearly identical to how Opera

operated the Platform at issue here.

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[5]   Plaintiff argues the Court should discount the Luna opinion because it is on
appeal before the United States Court of Appeals for the Ninth Circuit. On
November 20, 2015, the appeal was dismissed.

Plaintiff next argues that the system in <u>Luna</u> sent text messages from the website directly to cellular telephones, whereas, here, "Defendants' texting system includes a 'platform' that handles the connection between the client (here Opera) and cell phone carriers like MetroPCS, not end cell phone users." ([44] at 7). Plaintiff offers a strained reading of <u>Luna</u>. The <u>Luna</u> court merely stated that, as a result of the process initiated by the defendant—that is, logging onto the system, typing in the message, and clicking send or scheduling when the message should be sent—"an allegedly unwanted text message was sent to Plaintiff." 122 F. Supp. 3d at 937. This statement does not support Plaintiff's position that the system sent the message directly from the website to cellular telephones. Even if the system directly sent text messages, the other factual similarities between the human intervention required to use the Platform and that required to use the <u>Luna</u> system persuade the Court that the reasoning of the <u>Luna</u> court applies here.[6]

Plaintiff next argues that, if the Court were to adopt the <u>Luna</u> court's reasoning, it would ignore the 2015 FCC Order. First, the 2015 FCC Order "is not

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[6] As Plaintiff admits, the factual record in <u>Luna</u> "is not sufficiently detailed." ([44] at 7). Plaintiff nevertheless attempts to use the lack of detail in the <u>Luna</u> opinion to manufacture a difference between the <u>Luna</u> system and the Platform here.

dispositive of the present case because the FCC issued its ruling after the [text

messages] in question . . . ." Osorio v. State Farm Bank, F.S.B., 746 F.3d 1242,

1246 (11th Cir. 2014). Second, the Luna court thoroughly discussed the 2015 FCC

Order, and concluded the level of human intervention required to send text

messages precluded liability. See 122 F. Supp. 3d at 939-40. Third, Plaintiff

ignores that the 2015 FCC Order underscored that a defining characteristic of an

autodialer is the ability to dial numbers without human intervention. See 30 FCC

Rcd. 7961 ¶ 17. As the court in Derby v. AOL, Inc. observed, the 2015 FCC Order

"does not suggest that a system that never operates without human intervention

constitutes an ATDS under the statute. To the contrary, the 2015 [FCC] Order

reiterates that the basic functions of an autodialer are to dial numbers *without*

human intervention and to dial thousands of numbers in a short period of time."

No. 5:15-CV-00452-RMW, 2015 WL 5316403, at *4 (N.D. Cal. Sept. 11, 2015),

appeal dismissed (Mar. 18, 2016) (internal quotation marks omitted, emphasis in

original). The importance of the human intervention element is supported by the

decisions of other courts, including courts in our Circuit, that have acknowledged

that the FCC's orders require that, "[t]o determine whether a dialer is a predictive

dialing system, and therefore an ATDS, the primary consideration is whether

human intervention is required at the point in time at which the number is dialed."

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<u>Strauss v. CBE Grp., Inc.</u>, ⸻ F. Supp. 3d ⸻, 2016 WL 1273913 (S.D. Fla. Mar.

28, 2016) (internal quotations and ellipsis omitted); <u>see also</u> <u>Legg v. Voice Media</u>

<u>Grp., Inc.</u>, 20 F. Supp. 3d 1370, 1373 (S.D. Fla. 2014) (explaining that "defining

characteristic" of ATDS is "capacity to dial numbers without human

intervention"). Here, direct human intervention is required to send each text

message immediately or to select the time and date when, in the future, the text

message will be sent.

Plaintiff also cites a number of cases she contends the Court should apply

here in place of <u>Luna</u>. The Court first notes that the cases on which Plaintiff relies

were expressly rejected by the <u>Luna</u> court because the facts of those cases were

distinguishable. The Court agrees with the <u>Luna</u> court's analysis. For instance,

Plaintiff relies on <u>Sterk v. Path, Inc.</u>, 46 F. Supp. 3d 813 (N.D. Ill. 2014). In <u>Sterk</u>,

however, it was "undisputed" that the automated dialing system "made calls from

the list without human intervention." 46 F. Supp. 3d at 819-20. That is not the

case here. Similarly, the system in <u>Griffith v. Consumer Portfolio Serv., Inc.</u>, 838

F. Supp. 2d 723 (N.D. Ill. 2011) used predictive dialing software that reviewed

accounts that satisfied certain pre-selected criteria, copied the telephone numbers

associated with those accounts into a new file, and independently dialed the

numbers in the file. <u>See</u> <u>id.</u> at 724. In <u>Moore v. Dish Network L.L.C.</u>, 57 F. Supp.

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3d 639 (N.D.W.V. 2014), the lists of numbers were transferred to the dialer

without human intervention, and the dialer automatically dialed numbers from

those lists. Id. at 655. The court in Davis v. Diversified Consultants, Inc., 36 F.

Supp. 3d 217 (D. Mass. 2014) did not consider the human intervention element of

the ATDS analysis. In each of these cases—unlike here—the system itself dialed

numbers. Cf. In re Collecto, Inc., No. 14-MD-02513-RGS, 2016 WL 552459, at

*4 n.9 (D. Mass. Feb. 10, 2016) ("In the cases Collecto cites in support of its

argument [that the system is not an ATDS], human intervention was required to

dial the target telephones, not simply to activate the process (by assembling a list

of numbers and uploading them to the dialer)." (emphasis in original) (citing Luna,

122 F. Supp. 3d 936; Gragg v. Orange Cab Co., Inc., 995 F. Supp. 2d 1189 (W.D.

Wash. 2014) ("[T]he dispatcher must have pressed 'enter' to

transmit . . . information to both the TaxiMagic program and the nearest available

driver."))).

The Court finds the Luna court's reasoning sound and consistent with the

reasoning of other courts' findings that human intervention discredits that a

communication system is an ATDS. The Court finds that, in this case, the

uncontested evidence shows human intervention was required to send each text

message. "In sum, [Plaintiff's] claims fail as a matter of law because [s]he failed

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to establish a genuine issue for trial with respect to whether the [texts] were [sent]

using an ATDS, a necessary element of [her] claims." Gaza v. LTD Fin. Servs.,

L.P., No. 8:14-CV-1012-T-30JSS, 2015 WL 5009741, at *4 (M.D. Fla. Aug. 24,

2015). Defendants' Motion is granted.[7,8]

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[7]   In reaching this conclusion, the Court considered the arguments set out in
Plaintiff's Motion. The Court did not, however, consider the facts set forth in
Plaintiff's statement of material facts. Under the local rules of this Court,
Plaintiff's statement of material facts was required to be filed separately. L.R.
56.1(B)(1), NDGa. "[B]ecause [Plaintiff] included her facts only in her [] brief,
but not in a separate document, the Court is not permitted to consider such fact[s]
in resolving any pending motion for summary judgment." Boone v. City of
McDonough, No. 1:12-CV-1036-WSD, 2013 WL 4670480, at *5 (N.D. Ga. Aug.
29, 2013), aff'd, 571 F. App'x 746 (11th Cir. 2014) (internal quotation marks
omitted); see also Robinson v. Fulton Cty., No. CIVA 105CV-2250-RWS, 2008
WL 78711, at *6 (N.D. Ga. Jan. 4, 2008); L.R. 56.1(B)(1), NDGa. ("The court will
not consider any fact . . . set out only in the brief . . . ."). Even if the Court
considered the facts Plaintiff included in her statement of material facts, the facts
do not change the Court's analysis or its conclusion. The facts upon which the
Court bases its conclusion are those facts relevant to the human intervention
analysis. Plaintiff does not dispute the core facts of this analysis: to send a text
message, Opera employees navigated to the Platform's website, logged in, typed in
the text of the message to be sent, either clicked "send" to send the message
immediately, or scheduled a future date and time for the message to be sent using
the Platform's drop-down calendar function. (See DSOMF ¶¶ 64-74; PRDSOMF
¶¶ 64-74). Accordingly, Plaintiff's Motion is denied, and Plaintiff's Motion for
Leave is denied as moot.

[8]   Because the Court grants summary judgment to Defendants, the Court is not
required to address Defendants' arguments they are entitled to partial summary
judgment on Plaintiff's claim for treble damages. The Court also denies as moot
mGage's Motion seeking partial summary judgment, and denies as moot Plaintiff's
Motion to Strike mGage's Motion.

III.   CONCLUSION

For the foregoing reasons,

IT IS HEREBY ORDERED that Plaintiff Colette Jenkins's Motion for Summary Judgment [34] is **DENIED**.

IT IS FURTHER ORDERED that mGage's Motion for Partial Summary Judgment [36] is **DENIED AS MOOT**.

IT IS FURTHER ORDERED that Defendants mGage, LLC and LL Atlanta, LLC d/b/a Opera Nightclub's Motion for Summary Judgment [37] is **GRANTED**.

IT IS FURTHER ORDERED that Plaintiff's Motion to Strike mGage's Motion [47] is **DENIED AS MOOT**.

IT IS FURTHER ORDERED that Plaintiff's Motion for Leave to File Plaintiff's Statement of Facts (Out-of-Time) [54] is **DENIED AS MOOT**.

IT IS FURTHER ORDERED that this action is **DISMISSED**.

SO ORDERED this 12th day of August, 2016.
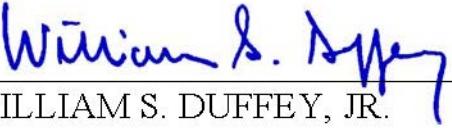
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WILLIAM S. DUFFEY, JR.
UNITED STATES DISTRICT JUDGE

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